NO. [redacted]30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLOYD LINN RATHBUN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

THOMAS K. HUDSON,
American Founders Bldg.,
1330 Leyden Street,
Denver, Colorado.

E. F. CONLEY,
771 Galena Street,
Aurora, Colorado.

Attorneys for Petitioner.

INDEX

	Page
I. Jurisdiction	1-2
II. Statute Involved	2
III. Question Presented for Review	3
IV. Concise Statement of Case	3-7
V. Argument	7-15
VI. Conclusion	15-16

STATUTE CITED

U.S.C.A., Title 47, Sec. 605 2

CONSTITUTION

Constitution of United States, Art. 3, Sec. 2: 2

AUTHORITIES CITED

Billeci v U. S., 184 Fed. (2d) 394 14

Nardone v U. S., 308 U.S. 338, 341; 60 S. Ct. 266, 268, 84 L. Ed. 307 ..... 14, 15

Nardone v U. S., 302 U.S. 379, 383; 58 S. Ct. 275, 277, 82 L. Ed. 314 13

Rathbun v U. S., 236 F. (2) 514 ..... 1, 4, 15

Reitmeister v Reitmeister, 162 F. (2d) 691 14

INDEX

Page

U. S. v Coplon, 88 Fed. Supp. 921 12

U. S. v Gruber, 123 F. (2d) 307 14

U. S. v Polakoff, 112 Fed. (2) 388 12-14

OTHER

Scott J. Marshall, Professor Electrical Engineering and Electronics, Colorado School of Mines 10

New Elementary Physics, by Robert Andrews Millikan and Henry Gordon Gale published by Ginn and Company 10

Telephone Theory and Practice by Kempster B. Miller Published by McGraw Hill Book Co. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 538

FLOYD LINN RATHBUN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

I. JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Tenth Circuit on August 23, 1956, and is reported in 236 Fed. (2d) 514, *Rathbun v. United States.*

Petition for Rehearing was denied by the Court of Appeals for the Tenth Circuit on October 1, 1956.

A Stay of Mandate was entered by said Court of Appeals for the Tenth Circuit on October 1, 1956.

Petition for Writ of Certiorari was filed on October 31, 1956.

On January 14, 1957, certiorari was granted by the United States Supreme Court.

This case involves the interpretation and application of a statute of the United States, to-wit: U.S.C.A. Title 47, Sec. 605. The decisions of the Circuit Courts of the United States which have construed and applied this statute are at wide variance and no semblance of uniformity has developed with relation to the interpretation and application of said statute.

The Constitution of the United States, Art. 3, Sec. 2, vests in the Supreme Court appellate jurisdiction in all cases arising under the Constitution and the laws of the United States.

II. STATUTE INVOLVED

U.S.C.A. Title 47, Sec. 605, 1928 Edition, page 161 of 1956 Supplement, the pertinent part of which provides as follows:

> "* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

III. QUESTION PRESENTED FOR REVIEW

Certiorari as granted by the Supreme Court was limited to the following question:

> Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. and the admission into evidence of testimony of said third person relating to the contents of the conversation a divulgence of such intercepted communication and thus prohibited by the aforesaid statute?

IV. CONCISE STATEMENT OF THE CASE

On April 7, 1955, an indictment in two counts was returned against Floyd Linn Rathbun (page 2) charging that he knowingly transmitted in interstate commerce a communication containing a threat to injure, being a violation of 18 U.S.C. 875 (b) and (c).

Specifically, the First Count of the indictment charged that on or about March 17, 1955, at approximately 1:15 a. m., MST, Rathbun knowingly, wilfully and with intent to extort from Everett Henry Sparks a thing of value, to-wit, 100,000 shares of stock of Western Oil Fields, Inc. did transmit in interstate commerce from New York City, New York, to Pueblo, Colorado, a communication by telephone to the said Sparks, in which said telephonic communication Rathbun did threaten to injure the person of and to kill the said Sparks, in violation of 18 U.S.C. 875 (b) (page 2).

The Second Count of the indictment charged that on or about March 17, 1955, at approximately 1:15 a. m., MST, the defendant Rathbun did knowingly and wilfully transmit in interstate commerce from New York City to Pueblo, Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant Rathbun did threaten to injure the person of and

No. ~~[illegible]~~ 30

In the Supreme Court of the United States

OCTOBER TERM, 1956

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:

Finnegan v. *Daly*, No. 13,526	7
Flanders v. *United States*, 222 F. 2d 163	7
Goldman v. *United States*, 316 U. S. 129	6, 7
James v. *United States*, 191 F. 2d 472	7
Pierce v. *United States*, 224 F. 2d 281, affirming, 124 F. Supp. 264	7
Rayson v. *United States*, Decided October 29, 1956 (Unreported), No. 15,021 (C. A. 9)	6
Reitmeister v. *Reitmeister*, 162 F. 2d 691	7
United States v. *Bookie*, 229 F. 2d 130	7
United States v. *Polakoff*, 112 F. 2d 888	7
Woolworth, F. W. Co. v. *Contemporary Arts*, 193 F. 2d 162, affirmed, 344 U. S. 228	8

Statutes:

Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (47 U. S. C. 605), Section 605	2, 5, 6
18 U. S. C. 875 (b) and (c)	3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 538

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. C. 10–14, R. 4–11) is reported at 236 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 23, 1956 (R. 12) and a petition for rehearing (R. 15–17) was denied on October 1, 1956. The petition for a writ of certiorari was filed on October 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the listening-in on an extension telephone to a telephone conversation, with the consent of one of the parties to the conversation, constituted an interception of a communication prohibited by Section 605 of the Federal Communications Act.

2. Whether the court's denial of petitioner's request, after the government's rebuttal, to present further testimony about an incident constituted an abuse of discretion, where the witness had already testified about that incident.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (47 U. S. C. 605), provides as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the

existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the District of Colorado under a two-count indictment which charged him with knowingly transmitting in interstate commerce on March 17, 1955, a communication containing a threat to injure one Everett H. Sparks, in violation of 18 U. S. C. 875 (b) and (c) (Tr. 3–4, 5).[1] He was sentenced to concurrent terms of imprisonment of one year and one day on each count and a fine of $1,000

[1] The designation "Tr." refers to the transcript of the trial proceedings.

upon count 1 (Tr. 5–6). On appeal, the judgment of conviction was affirmed (R. 12).

The evidence adduced at the trial may be summarized as follows:

Complaining witness Sparks had been a close business and social acquaintance of petitioner for about 12 to 15 years (Tr. 10, 53). Sometime about April 1954 (Tr. 55), a stock certificate covering 120,000 shares of stock in Western Oil Fields, Inc., was issued in Mr. Sparks' name and deposited as collateral in a New York bank to cover a $50,000 loan which Mr. Sparks had obtained for petitioner (Tr. 11, 54–55). In November 1954 and March 1955, petitioner and Mr. Sparks met in Sparks' office to discuss the termination of their business relationship and the repayment of the $50,000 (Tr. 18, 56, see also Tr. 62). Mr. Sparks testified that, at the November meeting, petitioner told him that "I am going to take care of you, and you're going to be pushing up daisies. Your wife's going to be a widow and your kids are all going to be orphans. If you think more about money than you do them, why you'll have it that way" (Tr. 18). Petitioner denied that he made such statements at that meeting (Tr. 62).

During the day and morning of March 16–17, 1955, petitioner, who was in New York, had about four telephone calls with Mr. Sparks in Pueblo, Colorado, in an attempt to have Mr. Sparks release the Western Oil Fields, Inc., certificate of stock so that he could obtain funds (Tr. 10, 11, 56–57, 58). In the telephone conversations, petitioner requested Mr. Sparks to release the Western Oil Fields stock and he would at the same time repay the $50,000 loan. Mr. Sparks refused to comply with petitioner's request unless

Western was first notified but petitioner did not wish Western to be notified (Tr. 11–15, 19, 58–62). Mr. Sparks testified that in two of the conversations preceding the final conversation early in March 17, 1955, which is the subject of the indictment, petitioner said he would "have to take care of" him [Mr. Sparks] if he did not comply with his request, and referred to the threats which he made to Mr. Sparks in their November meeting (Tr. 14–15). The last telephone conversation, which took place about 1:00 a. m., March 17, 1955 (Colorado time), was initiated by petitioner. In anticipation of the call Mr. Sparks had called Officers Maybers and Huskins of the local police who listened to the conversation on an extension telephone in an adjoining room when the call came in (Tr. 19). Mr. Sparks testified that during this call petitioner threatened to come out on the first plane and kill him because he refused to comply with petitioner's request as to the stock certificate (Tr. 19–20, 29). Petitioner, although admitting that he used strong and vulgar language, denied that he made any threats of any kind to Mr. Sparks in this or any other conversation (Tr. 58–62).[2]

Over petitioner's objection that such evidence was inadmissible as being in violation of Section 605 of the Federal Communications Act, *supra*, pp. 2–3 (Tr. 36–37, 41–42), Officer Huskins testified that he heard petitioner threaten to kill Mr. Sparks, because Mr. Sparks would not release the Western stock certif-

[2] Petitioner returned to Colorado the following day and was arrested in Denver. A gun was found in his possession, but petitioner said that having been a deputy marshal until thirty days prior thereto he always carried a gun (Tr. 63–64).

icate. He testified that petitioner said: "I am going to kill you and I don't care if you're making a recording of this conversation" (Tr. 41).

The facts with respect to the refusal of the trial court to permit the petitioner to introduce evidence to refute the government's rebuttal are set forth in the Argument *infra*.

ARGUMENT

1. This case raises the question of whether a violation of Section 605 of the Federal Communications Act occurs when a third person listens to a telephone conversation on an extension, with the knowledge and consent of only one of the parties. Perhaps the court could have interpreted the words "I don't care if you're making a recording of this conversation" (Tr. 41) as a consent to an interception, but it did not do so. In basing its decision on whether the petitioner's words were heard by the officer listening on the extention before they reached the ears of the intended recipient, the court adopted a test which, though previously suggested, has not been generally used by the other courts passing on this issue.[3]

On the issue of whether such listening-in (or recording) with the consent of one of the participants to a telephone conversation is in violation of Section 605 of the Communications Act, there appears to be a

[3] When the third person overhears the message as it is received in the instrument being used by the intended receiver, it has been held that this is not interception since the wire communication has been completed. *Rayson* v. *United States*, C. A. 9, Oct. 29, 1956. That situation is comparable to overhearing the voice of the sender as he speaks into the transmitter. Cf. *Goldman* v. *United States*, 316 U. S. 129.

conflict between the circuits. The Sixth and Seventh have decided that there is no violation, as did the court below (*United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C. A. 6); *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6)). On the other hand, the Second Circuit reached a contrary result in *United States* v. *Polakoff*, 112 F. 2d 888,[4] and the Court of Appeals for the District of Columbia Circuit in *James* v. *United States*, 191 F. 2d 472, indicated approval of the *Polakoff* decision.[5] In view of this conflict, the government does not oppose the grant of the petition if limited to this issue.

2. Petitioner and his wife testified that the November 1954 meeting with Mr. Sparks in his office was friendly with no threats being made; and that Mr. Sparks' secretary, Mr. Johnson, left the Sparks' offices before the meeting occurred, and did not return until after the conversations had been concluded (Tr. 67, 80–81, 85–87). In rebuttal for the government, Mr. Johnson testified that he was present in the outer office while petitioner and his wife met with Mr. Sparks on November 1954 in the inner office which was separated from the outer office by a partition which did not reach the ceiling, and that he heard petitioner threaten Mr. Sparks (Tr. 88–89). When the government completed its rebuttal, petitioner's

[4] In *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C. A. 2), Judge Learned Hand expressed the view that *Goldman* v. *United States*, 316 U. S. 129, was not inconsistent with *Polakoff*, while Judge Chase stated that *Goldman* superseded *Polakoff*. In any event, the decision in *Reitmeister* was based on consent to the interception, so that no ruling on the basic question was involved.

[5] The question is again before the Court of Appeals for the District of Columbia Circuit in *Finnegan* v. *Daly*, No. 13,526.

counsel asked leave to call petitioner in surrebuttal with relation to this meeting. The court pointed out that petitioner had already testified about the meeting and denied the request (Tr. 96–97).

Petitioner now contends (Pet. 7; Br. 10–11) that this action by the court constituted a denial of his right to impeach the credibility of the government's rebuttal witness. The record refutes this contention. Since the rebuttal evidence was not new and since petitioner did not claim then that his surrebuttal was for the purpose of impeachment, additional testimony at this point, particularly on an issue not directly involved, would have been merely cumulative. As such, it was clearly within the court's discretion to deny the request. *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162, 166–167 (C. A. 1), affirmed, 344 U. S. 228.

CONCLUSION

The government does not oppose the grant of a writ of certiorari, but respectfully submits that it should be limited to the first question presented.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

DECEMBER 1956.